

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:MAN:TL-N-547-00
CAMcInroy

date:

to: LMSB, Financial Services and Health Care:
Attn: William O'Connor, Team Coordinator, Group #1476

from: District Counsel, Manhattan

subject:

Consent to Extend Statute

The earliest statute of limitation on assessment for the taxable year at issue is set to expire on [REDACTED].

UIL No. 6501.04-05

DISCLOSURE STATEMENT

This advice may contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. This memorandum is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This refers to your request for our assistance in determining the proper entity to execute a consent to extend the statute of limitations (Form 872) for the above-referenced taxpayer.

ISSUE:

Who is the proper entity to sign a Form 872 (Consent to Extend the Time to Assess Tax) for the taxable period ending [REDACTED], a pre-merger tax period, for [REDACTED].

CONCLUSION:

[REDACTED] is the proper entity to execute Forms 872 (Consent to Extend the Time to Assess Tax) for [REDACTED] consolidated group for the taxable year ending [REDACTED].

FACTS:

The Manhattan Examination Division is considering a claim filed by [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]) for the taxable period ending [REDACTED]. The taxpayer seeks additional compensation expenses in the amount of \$ [REDACTED] that should have been claimed on the tax return for the period ending [REDACTED], a pre-merger tax period. The statute of limitations on assessment will expire on [REDACTED].

[REDACTED], a Maryland corporation, was the common parent of an affiliated group of corporations who filed a consolidated U.S. Corporate Income Tax Return (Form 1120) with its affiliates for the taxable period ending [REDACTED].

In [REDACTED], [REDACTED] (" [REDACTED] "), acquired [REDACTED] and a subsidiary of [REDACTED] through two mergers. The first merger, on or about [REDACTED], was between [REDACTED] and [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]), a Delaware corporation. According to the Articles of Merger filed with the State of Maryland Department of Assessment and Taxation¹, [REDACTED] merged with and into [REDACTED]; [REDACTED] emerged as the surviving corporation; and the business continued under the name [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]), a Delaware corporation. Also, according to the Articles of Merger, each share of [REDACTED] common stock (except common stock held in [REDACTED]'s treasury or directly or indirectly by [REDACTED] or any of its subsidiaries) converted into the right to receive shares of [REDACTED]. All shares of [REDACTED] common stock owned by [REDACTED] as treasury stock and all shares of common stock owned directly or indirectly by [REDACTED]

¹The taxpayer is unable to locate a copy of the Merger Agreements.

or its subsidiaries (with exceptions not relevant here) were canceled. Thus, once merged, [REDACTED] ceased to exist as a separate entity.

The second merger, on or about [REDACTED], was between [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]), a Maryland corporation and [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]), a Delaware corporation. [REDACTED] was a wholly owned subsidiary of [REDACTED] and [REDACTED] was a wholly owned subsidiary of [REDACTED]. According to the Articles of Merger filed with the State of Maryland Department of Assessments and Taxation, [REDACTED] merged with and into [REDACTED]; [REDACTED] emerged as the surviving corporation; and the business continued under the name [REDACTED] (" [REDACTED] ") (EIN: [REDACTED]), a Delaware corporation. Also, according to the Articles of Merger, all of the common stock of [REDACTED] was converted into one share of common stock of [REDACTED]. Thus, once merged, [REDACTED] ceased to exist as a separate entity.

As a result of these two mergers, [REDACTED] became a direct wholly owned subsidiary of [REDACTED] and [REDACTED] became a direct wholly owned subsidiary of [REDACTED] and an indirect wholly owned subsidiary of [REDACTED].

For the period ending [REDACTED], the pre-merger tax period, [REDACTED] filed a consolidated corporate income tax return as the common parent of an affiliated group. After the merger, the new entities, [REDACTED] and [REDACTED], filed a consolidated corporate income tax return with their new parent, [REDACTED].² Neither the old common parent ([REDACTED]) nor the surviving members of the old consolidated group designated an agent to act on behalf of the group. The statute of limitations must be extended for the pre-merger tax period ending [REDACTED] to allow the Examination Division additional time to consider the taxpayer's claim.

DISCUSSION:

In the instant case, although the acquisition by [REDACTED] involved two mergers, for purposes of determining the proper entity to extend the statute of limitations we are only concerned with the merger between [REDACTED], the common parent, and [REDACTED] corporation.

²In [REDACTED], [REDACTED] merged with [REDACTED] and changed its name to [REDACTED].

The statute of limitations on assessment generally expires three years from the date the tax return for such period was filed. I.R.C. § 6501(a). The Service and the taxpayer, however, may enter into a written agreement to extend the statute; a Form 872 ("Consent to Extend the Time to Assess Tax") is used. I.R.C. § 6501(c)(4).

Where a taxpayer files a return as a member of a consolidated group, the consolidated return regulations provide guidance as to the appropriate entity to enter into a consent to extend the statute. Treas. Reg. § 1.1502-1 et seq. Those regulations generally provide that the common parent is the sole agent for each member of the group authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent may execute waivers and, unless there is an agreement to the contrary, an agreement entered into by the common parent to extend the statute of limitations for the consolidated return year is applicable to each corporation that was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c). The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985).

Different rules apply however where, as here, a common parent ceases to exist. Treas. Reg. § 1.1502-77(d) provides three rules for determining which corporation has authority to act in a matter relating to the tax liability of the members of the group: (1) an entity designated by the old common parent may act as agent for the members of the group; or (2) if the old common parent fails to make such a designation, the surviving members of the old group may designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the district director may deal with the old group members on an individual basis. In the instant case, neither the old parent nor the surviving members designated an agent to act on behalf of the group. Consequently, the district director may deal with the old group members on an individual basis. If this is impractical or undesirable then alternative agents may be used.

Treas. Reg. § 1.1502-77T identifies certain alternative agents that may be used to extend the statute when the common parent ceases to exist. Alternative agents include, among others, "a successor to the former common parent in a transaction

to which I.R.C. § 381(a) applies." Treas. Reg. § 1.1502-77T(a)(4)(ii). In the instant case, if section 381 applies to the transaction then we believe that [REDACTED] (formerly [REDACTED]), successor to the former common parent [REDACTED], is the appropriate alternative agent to sign the consent.

Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph A, C, D, F or G of section 368(a)(1). We believe that section 368(a)(1)(A) ("Type A"), a statutory merger or consolidation, is the type of tax-free reorganization applicable here. In order to qualify as a reorganization under section 368(a)(1)(A) the transaction must be a merger or consolidation pursuant to the corporate laws of the United States or a State or Territory of the District of Columbia. Treas. Reg. § 1.368-2(b). In the instant case, the reorganization appears to have been structured as a Type A reorganization. According to the Articles of Merger, an Agreement and Plan of Merger dated [REDACTED] was approved by [REDACTED], the merging corporation, in the manner and by the vote required by its charter and the laws of Maryland and by [REDACTED], the surviving corporation, in the manner and by the vote required by the laws of Delaware and by its charter. When [REDACTED] merged into [REDACTED], all of its outstanding stock was either converted or canceled and [REDACTED] ceased to exist. Furthermore, Delaware corporate law provides, in part, that as of the date of the merger, the surviving corporation succeeds to and assumes all of the rights and obligations of the extinguished corporation. (See Del. Code Ann. tit. 8, section 259 (1999)).

The Service also holds that where two or more corporations are merged pursuant to state law, with fusion of assets and liabilities, so that the resultant corporation becomes in effect the same taxable entity as its absorbed constituents, a consent (Form 872) executed by the resultant corporation on behalf of an absorbed constituent to extend the period of limitation on assessment of income tax constitutes a valid agreement to extend the time for assessment. Rev. Rul. 59-399, 1959-2 C.B. 488.

In view of the above, we believe that [REDACTED] (formerly [REDACTED]), successor to the former common parent [REDACTED], is the appropriate alternative agent to sign the consent for the pre-merger tax period ending [REDACTED].

We recommend that the Form 872 be captioned as follows:

[REDACTED] (EIN: [REDACTED])
 formerly known as [REDACTED], as
 alternative agent for [REDACTED]
 [REDACTED] consolidated return group pursuant to
 Temp. Treas. Reg. § 1.1502-77T, and as successor in
 interest to, by way of merger with, [REDACTED]
 [REDACTED] (EIN: [REDACTED]).*

The following language should be added to the bottom of the page:

*This is with respect to the consolidated tax liability
 of [REDACTED] (EIN: [REDACTED]) [REDACTED]
 [REDACTED] consolidated group for the taxable period
 ending [REDACTED].

The EIN of [REDACTED] should also
 be entered in the upper right hand corner of each Form 872.

PROCEDURAL CONSIDERATIONS:

We direct your attention to I.R.C. § 6501 (c) (4) (B), which requires the Service to notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion that the taxpayer is requested to provide such consent. To satisfy this requirement, you may provide the taxpayer with Publication 1035, "Extending the Tax Assessment Period" when soliciting the consent. Alternatively, you may notify the taxpayer orally or in some other written form to satisfy the notification requirement. In any event, your action(s) in this regard should be well documented in the case file.

We further recommend that you strictly adhere to the rules set forth in the IRM. IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed form 872 to the taxpayer. Dated copies of both letter should be retained in the case files as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). In the event that a Form 872 becomes separated from the file or lost, these other documents would be invaluable to establishing the existence of an agreement.

If you have any further questions, please contact Cheryl
McInroy at (212)264-5473 ext. 212.

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